

**Laborers International Union of North America, AFL-CIO, Local No. 282 and Hartman-Walsh Painting Company<sup>1</sup> and District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL-CIO and Painters and Allied Trades Local Union #1292 affiliated with International Brotherhood of Painters and Allied Trades. Case 14-CD-649**

August 11, 1982

## DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Hartman-Walsh Painting Company, herein called the Employer, alleging that Laborers International Union of North America, AFL-CIO, Local No. 282, herein called the Laborers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL-CIO, herein called Painters District Council No. 2, and by Painters and Allied Trades Local Union #1292 affiliated with International Brotherhood of Painters and Allied Trades, herein called Painters Local #1292.

Pursuant to notice, a hearing was held before Hearing Officer Stephen B. Smith on April 13, 1982. All parties appeared<sup>2</sup> and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed. Upon the entire record in this proceeding, the Board makes the following findings:

### I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Missouri corporation with its principal place of business at 7144 North Market, St. Louis, Missouri, is engaged in commercial and industrial

painting and sandblasting. During the past 12 months, which period is representative herein, the Employer purchased paint and other equipment, materials, and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Missouri, of which paint and other equipment, materials, and supplies valued in excess of \$50,000 were shipped to the Employer's St. Louis, Missouri, facilities directly from points located outside the State of Missouri. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Painters District Council No. 2, Painters Local #1292, and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

### III. THE DISPUTE

#### A. Background and Facts of the Dispute

The Employer is engaged in the business of commercial and industrial painting and sandblasting. One of the Employer's jobsites is located in New Madrid County, Missouri, where the Employer is acting as subcontractor to two other contractors, Gibbs & Hill, Inc., and Flakt, Incorporated. The jobsite is owned by Associated Electric Cooperative, Inc., a public utility in southeastern Missouri. The Employer has been engaged by Gibbs & Hill for the purpose of performing finish painting work on structural and miscellaneous steel on a construction project on the site. The Employer's contract with Flakt involves touchup painting on the shop-applied primer coat on the same structural and miscellaneous steel. The Employer commenced work on the Gibbs & Hill work on or about March 15, 1981, and on the Flakt work in approximately October 1981.

All of the Employer's employees on the New Madrid County, Missouri, worksite are either members of Painters Local #1292 or of Painters District Council No. 2. The Employer has not employed employees represented by the Laborers on either the Flakt project or the Gibbs & Hill project.

On or about March 17, 1982, at 9 a.m., James Russell, the Employer's superintendent on the Gibbs & Hill project in question, entered the Employer's office trailer at the site. The Employer's salesman, Rick Trumm, and the Laborers shop steward, Richard Crader, were present. Crader asked what the Employer intended to do about the labor situation and when the Employer was going to sign

<sup>1</sup> The name of the Employer was amended at the hearing.

<sup>2</sup> No appearances were made, or briefs filed, on behalf of Painters District Council No. 2.

a contract with the Laborers and hire laborers. Superintendent Russell responded that they had no need for a laborer. Crader replied that laborers could carry paint hoses, paint, and paint buckets, and perform general cleanup work. Russell testified that he told Crader that the work in question was painters' work. Crader stated that the Laborers business agent, Jim Bollinger, would come to the jobsite and picket unless the matter was resolved.

At 2 p.m. that same day, Crader and the Laborers recording secretary, Ray Hasting, approached the office trailer on the jobsite and spoke with Trumm and Russell. Crader asked again how the Employer intended to resolve the "problem"; i.e., when would they sign a contract and hire laborers. Russell repeated his earlier response that there was no need for a laborer on the job. Both conversations were reported to the Employer's president, Michael Clark.

The next day Clark spoke with Business Agent Bollinger by telephone. According to Clark's testimony, Bollinger told him that the Employer was going to have to sign a contract and hire laborers for certain items of work. Clark also testified that Bollinger told him that this was the way it was done in southeast Missouri, that the Employer was not the only one that he was making sign contracts, and that the Employer would not work without a contract. Clark advised Bollinger that they had no need for a laborer. Clark testified that Bollinger responded that "he guessed his men could paint a small building then."<sup>3</sup>

At or about 2 p.m. that day Bollinger met with Russell on the jobsite, and, according to Russell's testimony, stated that he had spoken with Clark, who was obviously misunderstanding him. According to Russell's testimony, Bollinger told Russell that he had tried to convey the necessity to Clark of signing a contract with the Laborers to work in the southeast Missouri area. Russell testified that Bollinger said that if a contract was not signed, or "if we have not resolved the problem," picketing would commence the following morning.

On March 19, 1982, picketing commenced. The Laborers admits that it engaged in the picketing. The picket signs recited that the Employer did not have a contract with the Laborers. As a result of the picketing, all work on the project was stopped. None of the other trades on the site crossed the Laborers picket line. The charges herein were filed shortly thereafter.

<sup>3</sup> The record fails to disclose what Bollinger meant by this last remark. If he meant that he was claiming the painting of small buildings at the site for laborers, we note that the Laborers later disclaimed any interest in the work. See fn. 4, *infra*.

### B. *The Work in Dispute*

The work in dispute involves the assignment of the following work tasks: carrying paint hoses; general cleanup; removing paint cans; and carrying paint cans to the worksite for Hartman-Walsh Painting Company at the Associated Electric Co-operative, Inc., power plant jobsite located in New Madrid County, Missouri.<sup>4</sup>

### C. *The Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and that there exists no voluntary method for settling the dispute. The Employer also contends that the factors of collective-bargaining agreements, economy and efficiency, and its initial assignment of the work favor an award to its employees represented by Painters District Council No. 2 and Painters Local #1292. The Employer further contends that, apart from the cleaning up of painting equipment and the discarding of empty paint cans, there is no general cleanup work to be performed on the jobsite. Finally, the Employer contends that one or more painters might have to be laid off if the work is assigned to members of the Laborers.

The Painters Unions did not file a brief but at the hearing took essentially the same position as the Employer.

The Laborers argues that the Board should not proceed to a determination of dispute in this case. It claims there is no reasonable cause to believe that it engaged in coercive conduct within the meaning of Section 8(b)(4)(D) of the Act, and it argues that the picketing was lawful as it was done solely for the purpose of informing the public that it did not have a contract with the Employer. The Laborers also contends that area and industry practice, the Employer's past practice, a memorandum of agreement executed with the Employer with respect to a prior jobsite, and economy and efficiency of operations favor an award of the disputed work to employees represented by the Laborers.

### D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon

<sup>4</sup> Although the painting of small buildings was encompassed in the notice of hearing issued in this matter as one of the disputed work tasks, the Laborers specifically disclaimed this work task at the hearing. As no evidence was presented that this was not a valid disclaimer, we find that this task is not in dispute and deny the Employer's request for an adjudication of this issue on its merits.

a method for the voluntary adjustment of the dispute.

As described above, there is testimony in the record that the Laborers demanded that the Employer hire laborers for certain items of work, threatened to picket if such a reassignment was not made, and, in fact, did so picket.<sup>5</sup> Further, since the threat to picket was made simultaneously with the Laborers demand that the Employer hire Laborers, we do not find merit to the Laborers argument that the threat to picket and the picketing itself was solely for informational purposes. Instead, it appears that an object of the Laborers threat and picketing was to force or require the Employer to assign the disputed work to persons represented by the Laborers rather than to those represented by Painters District Council No. 2 and/or Painters Local #1292. Accordingly, and without ruling on the credibility of the testimony in issue, we are satisfied that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) had occurred. Furthermore, all parties agree that there is no voluntary method for the private settlement of this dispute. Under these circumstances, we find that it will effectuate the policies of Section 10(k) and Section 8(b)(4)(D) of the Act for us to determine the merits of the dispute. Therefore, we find that this dispute is properly before the Board.

#### *E. Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.<sup>6</sup> The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.<sup>7</sup>

The following factors are relevant in making the determination of the dispute before us:

##### *1. Collective-bargaining agreements*

The Employer has maintained collective-bargaining relations for many years with both Painters District Council No. 2 and Painters Local #1292 and has been party to a series of contracts with those Unions, the last ones effective April 1, 1979,

through March 31, 1982. Both of these contracts were in effect at the time the dispute arose. Consequently, we find that their subsequent expiration is not significant.<sup>8</sup> Additionally, the retroactive wage clause in the expired contract of Painters Local #1292 is still in effect and the Employer is still applying the terms of the expired contracts to its employees.

Contrary to the Laborers contention, these agreements extend geographical jurisdiction over the work in dispute to the two Painters Unions. Thus, the Painters Local #1292 contract provides that "[t]his Agreement shall cover the following counties in Southeast Missouri, and shall be known as the Southern Unit of Local Union 1292: Reynolds, Iron Shannon, Carter, Wayne, Bollinger, Cape Girardeau, Oregon, Ripley, Butler, Stoddard, Scot, Missouri, New Madrid, Pemiscot, and Dunklin," and the Employer's contract with Painters District Council No. 2 contains broad jurisdictional language which would appear to encompass New Madrid County, since it "includes any county that is awarded to District Council No. 2 Jurisdiction by the Brotherhood of Painters and Allied Trades AFL-CIO."

More importantly, both agreements appear to cover the work in dispute. Thus, section 6-11 of the Employer's contract with Painters Local #1292 provides:

The following shall be the work of painters and job assignments shall be made to painters, but shall not be limited to the following:

Driving of company vehicles, unloading and stockpiling of all materials, dispersal of all materials on the job site, mixing of all materials, applying of all materials such as, but not limited to: all adhesive compounds for wall paper and wall coverings, all wall paper, all wall covering, all preparations for painting, all cleaning of tools, all preparations for wall papering or wall covering, taping and pointing of drywall, sanding and finishing of drywall, loosening of damp joints, topping, drywall compound, paint, and etc. from floors, wiping of damp paint, adhesives, and etc. from all surfaces, all patching in preparation for painting, wall papering, wall covering, sealing and varnishing of all wood surfaces, loading and unloading of all tools into and from company vehicles, prime and finish painting of drywall, concrete block, walls, ceilings, door frames,

<sup>5</sup> In reaching the above conclusion, we find no merit to the Laborers contention that much of the evidence supporting the conclusion is hearsay. Although Clark's testimony as to what was said during the Russell-Trumm-Crader conversations of March 17 and the Bollinger-Russell conversation of March 18 is hearsay, Russell, who was present during these conversations, testified to the events in question.

<sup>6</sup> *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [Columbia Broadcasting System], 364 U.S. 573 (1961).

<sup>7</sup> *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

<sup>8</sup> Further, although these contracts have lapsed, Mark Slinkard, business representative for Painters Local #1292, testified that a new agreement had been negotiated and ratified by the membership. At the time of the hearing it was not yet signed. There was no evidence as to whether a new agreement had been negotiated with Painters District Council No. 2.

doors, and all surfaces on the job site to be painted to comply with all check-lists for the completion of the job.

Similarly, Section 19 of the Painters District No. 2 contract provides:

Sufficient time shall be allowed to all employees covered by this Agreement on all jobs . . . prior to quitting time to clean and put away the tools. All other work such as taking down scaffolds, or ladders, folding away drop cloths, etc., shall be done on the employer's time,

and Section 27 of that agreement provides that "all of the lawful clauses of the collective bargaining agreement in effect in said other geographical jurisdiction and executed by the Employers of the Industry and the Local Unions in that jurisdiction" incorporate by reference, *inter alia*, section 6-11 of the Painters Local #1292 agreement.

The Laborers, on the other hand, points out that it has signed an agreement with the Employer albeit for another jobsite. However, this agreement is not applicable to the instant worksite and is not useful in determining the instant work dispute.

Accordingly, we find that only the Employer's contracts with Painters District Council No. 2 and Painters Local #1292 are material and that those contracts favor an assignment of the disputed work to the employees represented by those two labor organizations.

## 2. Past practice of the Employer

In the past, the Employer has always awarded this type of work to painters who are represented by Painters District Council No. 2 and Painters Local #1292. There was evidence that on at least one occasion the Employer hired a laborer (or laborers) to do some cleanup work at another worksite. In this regard, the Laborers presented the testimony of those laborers who did some cleanup work for the Employer at a jobsite in Cape Girardeau, Missouri. They listed their job duties as including general cleanup work, cleanup of paint droppings, and cleanup work related to sandblasting. One of the laborers, David Hahn, testified that he did not see any laborer at the Cape Girardeau site clean up paint cans, brushes, or painting equipment. Further, while the Employer's president, Clark, admitted hiring a laborer at the Cape Girardeau jobsite, he testified that the laborer hired turned out to be inefficient. Thus, the evidence shows that, with the exception of the one worksite noted above (and then not conclusively as to either the exact work performed or the satisfactoriness of that which was performed), painters have exclu-

sively performed the work tasks of carrying paint hoses, general cleanup, removing paint cans, and carrying paint cans to the worksite on all of the Employer's painting projects. Accordingly, we find that company practice in general favors assignment of the disputed work to employees represented by Painters District Council No. 2 and/or Painters Local #1292.

## 3. Industry and area practice

The Laborers adduced some evidence of area and industry practice with respect to assigning laborers to assist members of the Painters Unions in the carrying of equipment and materials and cleaning up of paint spills and paint cans on jobsites in southeast Missouri. However, the Employer adduced other evidence that the carrying of full and empty paint cans, as well as hoses, and general cleanup associated with painting were duties customarily and normally performed by painters—including painter apprentices, who perform such tasks as a part of their training, especially in circumstances where, as here, these duties are minimal. Thus, although it appears from the evidence that laborers have performed work in this area similar to that in dispute, the evidence shows that these jobs are also done by painters. Inasmuch as area and industry practice is mixed, this factor favors neither group of employees.

## 4. Skills

As both groups of employees possess the necessary skills to perform the work, this factor favors neither one.

## 5. Efficiency and economy of operations

There is not enough work on this job to make the hiring of laborers economical or efficient. The Employer's president, Clark, testified without contradiction that on this particular job the work in dispute involves tasks which take 30-60 minutes of actual worktime each day to complete, with individual tasks lasting only between 2-15 minutes. Further, the record shows that most of the tasks are incidental to, as well as integral to, the painters' painting duties and can easily be performed in the normal course of the painters' workday. In addition, it is more efficient, in the circumstances of this case, for a painter to quickly clean up a spill rather than wait until a laborer is found to do the work.<sup>9</sup> Finally, Clark testified that he was required

<sup>9</sup> A laborer would have to be found at the site, as the Employer testified without contradiction that there was not enough work to keep a laborer busy even for a few hours straight. Thus, it would not be economical to pay a laborer for a full day's work when he would be idle for most of the time.

by section 6-3 of the Painters Local #1292 contract to allow painters paid time to clean up equipment and to do general cleanup. Allowing the laborers to do cleanup work would necessarily result in the Employer's paying its painters while they remained idle during the cleanup time. Accordingly, we conclude the record establishes that the factors of efficiency and economy of operations favor awarding the work to employees represented by Painters District Council No. 2 and/or Painters Local #1292.

#### 6. The Employer's assignment and preference

The Employer has assigned the disputed work, and prefers an assignment, to employees represented by Painters District Council No. 2 and Painters Local #1292. Accordingly, we find that this factor, while not determinative, favors awarding the work to employees represented by those labor organizations.

#### 7. Job loss

Clark testified without contradiction that the Employer would be forced to lay off one or more of its painters in the event it had to assign any of the work to members of the Laborers. Accordingly, this factor favors the assignment of the work to members of Painters District Council No. 2 and/or Painters Local #1292.

#### Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Painters District Council No. 2 and Painters Local #1292 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreements, the Employer's past practice, economy, and efficiency of operations, the Employer's assignment and preference, and job loss, all of which favor an award of the disputed work to the employees represented by Painters District Council No. 2 and/or Painters Local #1292. In making this determination, we are awarding the work in question to employees who are represented by Painters District Council No. 2 and Painters Local #1292, but not to those Unions or their members.

#### Scope of Determination

The Employer contends that the award by the Board should be broad because there is reason to believe that the Laborers will continue to claim such work in the future at other jobsites of the Employer. The record, however, does not support a finding, required for the granting of a broad order, that the dispute will necessarily extend to any broader geographic area than the site here involved. Our present determination is therefore limited to the specific site where the instant dispute arose.

#### DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Hartman-Walsh Painting Company who are represented by District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL-CIO, and/or Painters and Allied Trades Local Union #1292 affiliated with International Brotherhood and Allied Trades are entitled to perform the following work tasks: carrying paint hoses; general cleanup; removing paint cans; and carrying paint cans to the worksite for Hartman-Walsh Painting Company at the Associated Electric Cooperative, Inc., power plant jobsite located in New Madrid County, Missouri.

2. Laborers International Union of North America, AFL-CIO, Local No. 282, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Hartman-Walsh Painting Company to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Laborers International Union of North America, AFL-CIO, Local No. 282, shall notify the Regional Director for Region 14, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.